

ORAL STATEMENT OF
THE ASSOCIATION OF NATIONAL ADVERTISERS, INC.
TO THE
UNITED STATES HOUSE OF REPRESENTATIVES
COMMITTEE ON ENERGY AND COMMERCE
SUBCOMMITTEE ON HEALTH AND THE ENVIRONMENT
HEARING ON ADVERTISING OF TOBACCO PRODUCTS
AUGUST 1, 1986

Thank you Mr. Chairman.

I'm Gilbert Weil, General Counsel to the Association of National Advertisers.

A.N.A.'s membership embraces advertisers of every type of product and service that is nationally or regionally advertised.

Tobacco products are simply one segment. We're not here to plead especially for that industry as an industry.

We are here to safeguard principles that are fundamental to all advertising.

For any product or service.

Those principles are vital, and so we tremendously appreciate your allowing us to address them today.

They spring from a fundamental concept of our democracy: that our people are not to be treated as so incompetent they can't be left to decide for themselves whether to use some lawful product or service. That government must control their behavior by keeping them in informational isolation from its advertising.

A major step, that, to thought control!

Toward Big Papadom!

That principle is embodied in the First Amendment.

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The Supreme Court made that crystal clear in Virginia Pharmacy when it wrote, "What is at issue is whether a State may completely suppress the dissemination of concededly truthful information about entirely lawful activity, fearful of that information's effect upon its disseminators and its recipients. . . . [W]e conclude that the answer to this one is in the negative."

We further come to remind you of the three constitutional imperatives set forth in Central Hudson and followed unvaryingly by the Supreme Court ever since, even in Posadas.

Accordingly, while we leave to others to argue the product-specific issue of a governmental interest, if any, in reducing use of tobacco, we are concerned over the absence of requisite proof that banning or taxing its advertising will directly advance such an interest, if it exists.

We are equally concerned that no attention has been given, or evidence marshalled, as to whether the restrictions proposed are the minimum needed.

That minimum may well be to leave matters alone long enough to determine whether labeling measures so enthusiastically endorsed by Congress only a short time ago are themselves adequate.

Now, allow me a moment to scotch the canard being so gleefully shouted by the willy-nilly censors that Posadas has somehow thrown First Amendment law back to where it was before Virginia Pharmacy and Central Hudson. It has not.

It is a micro-decision masquerading in mega-rhetoric.

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Its restriction upon advertising, as distinct from its dicta, is inconsequential.

Its holding is only that the Puerto Rican restriction against advertising for casino gambling is not facially unconstitutional because:

It does not restrict advertising in the mass media of Puerto Rico, even though it reaches residents of Puerto Rico, as long as the name of the hotel is linked to the casino.

It does not prohibit advertising even in local media unless it is addressed to inviting residents of Puerto Rico to visit the casino.

It does not restrict promotional materials within the hotel for the casino, even to Puerto Rican residents.

Indeed, the holding of the Puerto Rican courts, which our Supreme Court did not disturb, was that the statute was unconstitutional in the manner it had been applied to Posadas. Not "facially", but as applied.

In short, Mr. Chairman, A.N.A.'s position and advocacy is simply this:

If, but only if, it is established by requisite proof 1) that there is a substantial public interest in curtailing use of tobacco products, and 2) that advertising is a significant cause for use of tobacco products, so that restricting it will directly and materially reduce such use, and 3) that the nature of the legislative restriction is the minimum that

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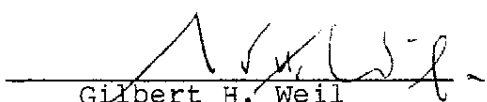
is needed to achieve that result, A.N.A. will be satisfied that the principles of the First Amendment's protection of advertising rights will have been met and preserved.

That is all A.N.A. seeks.

Failing adequate proof, however, of any one of these conditions, A.N.A. respectfully submits that your subcommittee should responsibly reject an emotional temptation to recommend constitutionally flawed legislation.

We thank your subcommittee for its conscientious attention to our position.

Dated: August 1, 1986.



Gilbert H. Weil
General Counsel

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